IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No 199 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ALEMBIC LTD.

Versus

DIPAKKUMAR J SHAH

Appearance:

1. COMPANY PETITION No. 199 of 2001

MRS SWATI SOPARKAR for Petitioner No. 1

PARTY-IN-PERSON for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 15/02/2002

ORAL JUDGEMENT

This is a petition filed by Alembic Ltd., a Company registered under the Indian Companies Act, 1882 having its Registered Office in Vadodara for obtaining sanction of this Court to the Scheme of Demerger and Transfer of Bulk Drugs Manufacturing Unit of Darshak Ltd. with the petitioner Company under Sections 391 to 394 of

the Companies Act, 1956 (`the Act' for brevity).

2.0 Background facts and justification for the proposed Demerger/Merger offered by the petitioner.

2.1 The petitioner Company was incorporated in the year 1907 in the name of Alembic Chemical Works Company Ltd. and the name was changed to Alembic Ltd. on 31.5.1999. As on 31.12.2000, the petitioner Company had fully paid up equity shares to the extent of Rs.7.21 Crores (rounded off). The main object of the Company is to carry on business as manufacturers of bulk drugs, pharmaceuticals, chemicals, fine chemicals and other products.

2.2 The demerged Company i.e. Darshak Ltd. was incorporated in the year 1972 with its Registered Office situate in the State of Karnataka. Earlier Darshak Ltd. had also been acting as a marketing agent for selling and distribution of the products of Alembic Ltd. in the southern India region. Darshak Ltd. also entered the manufacturing field in 1996 for manufacturing bulk drugs. It came out with public issue and rights issue of shares to meet with its financial requirements. However, Darshak Ltd. could not perform well and has been incurring losses which are attributed to Bulk Drug Division, as the other operations are found to be profitable even now. On account of the losses of the Bulk Drug Division, Darshak Ltd. is making overall losses since last two years.

2.3 Since Alembic Ltd. is looking forward to enter into the highly potential USA market in a big way, it requires approval from the United States Federal Drug Authority (USFDA). However, in view of the stringent requirements being stipulated by the said authority which Alembic Ltd. cannot provide for at its existing manufacturing plant in Baroda, and also because Alembic Ltd. is required to manufacture different bulk drugs at different locations, Alembic Ltd. requires a relatively new and separate manufacturing plant. The Bulk Drug Division of Darshak Ltd. can meet with the requirements of Alembic Ltd. for the purpose of the aforesaid USFDA approval. Hence, the management of both the Companies thought it appropriate to demerge the Bulk Drug Division of Darshak Ltd. and merge the same with the resulting Company i.e. Alembic Ltd. The other advantageous of such an arrangement are set out in para 7.3 of the petition.

3.0 Proposed Scheme - Exchange Ratio

3.1 Darshak Ltd. i.e. the demerged Company and Alembic Ltd., the resulting Company, therefore, worked out the proposed scheme of demerger. Broad features of the proposed scheme are as under :-

3.2 The Bulk Drug Division of Darshak Ltd. is to be taken over by Alembic Ltd. with effect from 1st April, 2000. All debts, liabilities, duties and obligations relatable to the Bulk Drug Division of Darshak Ltd. shall be and stand transferred so as to become debts, liabilities, duties and obligations of Alembic Ltd., without obtaining consent of any third party. All the relatable properties and assets including land and buildings, plant and machinery, stock-in-trade, goodwill and other intangibles etc. of the Bulk Drug Division of Darshak Ltd. shall stand transferred to Alembic Ltd. with effect from the aforesaid date.

3.3 All legal proceedings, if any, by or against Darshak Ltd. relating to and in respect of its Bulk Drug Division shall be continued by or against Alembic Ltd.

3.4 Alembic Ltd. shall issue and allot in its capital at par, credited as paid up, to the members of the demerged Company (Darshak Ltd.) in the following proportion :-

6 (six) equity shares of Rs.10/- each credited as fully paid up of Alembic Ltd. (the resulting Company) shall be issued and allotted at par against 100 (one hundred) equity shares of Rs.10/- each to the shareholders of Darshak Ltd. (the demerged Company) whose names appeared in the register of Darshak Ltd. on the record date.

The scheme also provides for pro rata basis of distribution and treatment to be given to the fractions arising due to the above exchange ratio.

3.5 For the purpose of the scheme, the values of the relatable assets and liabilities of the Bulk Drug Division of Darshak Ltd. shall be the values as appearing in the books of Darshak Ltd. immediately before the demerger, as certified by the statutory auditors of Darshak Ltd. as detailed in the schedule and the other liabilities shall be paid and discharged by Alembic Ltd.

3.6 Operations of Darshak Ltd. shall not stand

dissolved or wound up by virtue of sanction to the proposed scheme and Darshak Ltd. shall continue with its business as a going concern for the remaining undertakings i.e. other than the Bulk Drug Division.

4.0 Procedure - Meetings - Results

4.1 Alembic Ltd. filed Company Application No. 231 of 2001 before this Court and by order dated 9.8.2001, this Court directed Alembic Ltd. to convene separate meetings of the secured and unsecured creditors of the Company and the workers of Alembic Ltd. for considering the Scheme of Arrangement and Restructure. As far as the shareholders of Alembic Ltd. is concerned, this Court directed by the aforesaid order to obtain approval of the equity shareholders to the proposed scheme by way of postal ballots as envisaged under the Companies (Passing of Resolutions by Postal Ballot) Rules, 2001.

4.2 Notices of the meetings were advertised in Indian Express and Jansatta (both Baroda editions) of 29th August, 2001 and also in Indian Express (Ahmedabad & Mumbai editions) and Jansatta (Ahmedabad edition) of 30th August, 2001. The meetings of the secured and of the unsecured creditors were held at Baroda on 29th September, 2001.

4.3 Since the only objector to the proposed scheme in the present proceedings is a shareholder, the Court does not think it fit to give in great details the figures about the number of secured creditors and unsecured creditors who gave their approval to the aforesaid arrangement for demerger of Bulk Drug Division of Darshak Ltd. and merger of the same with Alembic Ltd. Suffice it to state that the secured creditors with a total debt of Rs.90.78 Crores (rounded off) unanimously approved the scheme of arrangement. So also, the unsecured creditors with a total debt of Rs.161 Crores (rounded off), present at the meeting, unanimously approved the scheme of arrangement. None of the secured or of the unsecured creditors present at the meeting voted against the proposed scheme.

4.4 As far as the shareholders are concerned, the postal ballots invited from the shareholders were responded to by 3266 equity shareholders and the value of their holding is to the tune of Rs.5.36 Crores (rounded off) being 53.58 lacs (rounded off) equity shares of Rs.10/- each. The scrutiny of the postal ballots revealed the following results :-

2967 equity shareholders representing the value of Rs.5.32 Crores (rounded off) voted in favour of the proposed resolution for approval of the proposed scheme and only 299 equity shareholders having value of their shares at Rs.3.62 lacs (rounded off) voted against the proposed resolution. 27 votes were found invalid or conditional and were not taken into account. The resolution approving the scheme of arrangement was carried by majority of 90.85% in number and 99.32% in value.

The resolution proposing the approval of the scheme of arrangement was thus accepted by all the secured and the unsecured creditors as well as by an overwhelming majority of the shareholders.

4.5 The report of the aforesaid meetings is produced by Alembic Ltd. on the record of Company Application No. 213 of 2001 alongwith the affidavit dated 1.10.2001 of Mr Chirayu Amin, Chairman of the meetings.

5.0 Present Petition

5.1 The present Company Petition came to be filed on 11.10.2001 for obtaining sanction of this Court to the aforesaid Scheme of Arrangement and Restructure.

5.2 While admitting the petition on 12.10.2001, this Court directed public notice to be advertised in Indian Express (English) and Jansatta (Gujarati), both Baroda editions as the Registered Office of the petitioner Company is situate at Baroda. The notice in the official gazette was dispensed with. Notice was also ordered to issue to the Central Government.

5.3 In response to the aforesaid notice to the Central Government, Ms PJ Davawala, the learned Additional Standing Counsel for the Central Government has produced a photostat copy of the letter dated 11.12.2001 from Mr SK Mandal, Registrar of Companies, Gujarat to the learned Additional Standing Counsel stating that the matter may be left to this Court to decide on merits. The learned Additional Standing Counsel has submitted that the Central Government has no objection to appropriate orders being passed by this Court on merits as the Central Government does not propose to oppose the sanction being granted to the Scheme of Arrangement and Restructure proposed by the petitioner Company.

6.0 Objections to the proposed Scheme

In response to the public notice published in the newspapers dated 16.10.2001, only one person has come forward with objections, being Mr Dipakkumar J Shah, who is a shareholder in the petitioner-Company with 30 shares of the face value of Rs.10/- each. In his objections dated 6.12.2001 and in his written statement dated 20.12.2001, he has raised various technical objections. At the time of making oral submissions, the objector who has been appearing as a party in person has raised the following major objections:-

(i) Working out of the exchange ratio for issuance of shares in Alembic Ltd. to the shareholders of Darshak Ltd. is not in accordance with law and the financial practices.

(ii) The valuation report of the Chartered Accountants is not satisfactory and proper explanation is not given for suggesting the ratio as adopted in the scheme.

(iii) Proper details about the shareholding of the Directors of Alembic Ltd. have not been given in the explanatory statement and there was no adequate disclosure of all the relevant facts as required by the provisions of Section 393 of the Act.

(iv) The petitioner Company has not produced the latest financial position of both the Companies and, therefore also, the sanction sought for may not be granted.

The party-in-person has also read out several passages from "A Ramaiya's Guide to the Companies Act", 15th Edition 2001.

7. On the other hand, Mr SN Soparkar and Mrs Swati Soparkar, learned counsel for the petitioner Company have submitted that the proposed scheme deserves to be sanctioned; and that the objections raised by the solitary shareholder are not only untenable but are also frivolous and that exemplary costs be awarded against the said objector as the objections are not lodged bona fide.

DISCUSSION

8. Before dealing with the rival submissions, it will be necessary to set out the principles laid down by

the Hon'ble Supreme Court in Miheer H Mafatlal Vs. Mafatlal Industries Ltd., AIR 1997 SC 506 about the scope of power of the Company Court under Sections 391 and 394 of the Companies Act. The principles are summarized by the Apex Court itself in the following terms :-

"In view of the aforesaid settled legal position, therefore, the scope and ambit of the jurisdiction of the Company Court has clearly got earmarked. The following broad contours of such jurisdiction have emerged :

1. The sanctioning Court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.

2. That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391, sub-section (2).

3. That the concerned meetings of the creditors or members of any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.

4. That all necessary material indicated by Section 393(1)(a) is placed before the voters at the concerned meetings as contemplated by Section 391, sub-section (1).

5. That all the requisite material contemplated by the proviso to sub-section (2) of Section 391 of the Act is placed before the Court by the concerned applicant seeking sanction for such a scheme and the Court gets satisfied about the same.

6. That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the Scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose

underlying the scheme and can judiciously X-ray the same.

7. That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising of the same class whom they purported to represent.

8. That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.

9. Once the aforesaid broad parameters about the requirement of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction.

The aforesaid parameters of the scope and ambit of the jurisdiction of the Company Court which is called upon to sanction a Scheme of Compromise and Arrangement are not exhaustive but only broadly illustrative of the contours of the Court's jurisdiction."

Objection Nos (i) & (ii) - Exchange Ratio

9. In light of the aforesaid principles, this Court proceeds to examine the grievance of the objector that the exchange ratio has not been properly worked out. The objector is a shareholder in Alembic Ltd. with 30 shares of Rs.10 each. The objector, who is himself a Chartered Accountant by profession, is not in a position to indicate as to how the exchange ratio is detrimental to

the shareholders of Alembic Ltd. The exchange ratio of six shares of Alembic Ltd. (resulting Company) in lieu of 100 shares of Darshak Ltd. has been proposed in view of the report of M/s Sharp & Tannan Associates, Chartered Accountants. In their report dated 17.4.2001, the Chartered Accountants have referred to the following valuation techniques which are generally used in ascertaining the fair value of a business :-

a. Net Asset Value (NAV)
b. Profit Earning Capacity Value (PECV)
c. Combination above
d. Valuation based on Discounted Cash Flow Technique (DCF)

The Chartered Accountants have then discussed the merits and demerits of the different techniques and thereafter suggested that since the DCF method captures all the elements of the value of a business compared to the other methods, the DCF method comprehends the difference between the values of firms having similar accounting earnings due to the difference in capital investments and other cash flows required to sustain these earnings. By adopting the said technique, the Chartered Accountants have worked out the fair value per share of Alembic Ltd. and Darshak Ltd. as under :-

Company	Valuer per share
Alembic Ltd.	Rs.287.17
Darshak Ltd.	Rs. 15.91

The Chartered Accountants have, therefore, suggested that on the basis of the aforesaid fair value per share, they consider fair and reasonable, a share exchange ratio of one equity share of Rs.10/- each of Alembic Ltd. for 18 equity shares of Rs.10/- each of Darshak Ltd. for the purpose of the proposed merger. Thus the Company has accordingly adopted the share exchange ratio of 6 equity shares of Rs.10/- of Alembic Ltd. for 100 equity shares of Rs.10/- each of Darshak Ltd. for the purpose of proposed merger.

10. Apart from the fact that the objector has not been able to make any dent in the reasoning given by the Chartered Accountants for adopting the discounted cash flow technique as the basis of valuation, the objector himself has not suggested any other alternative method or ratio. In the aforesaid decision in the case of Miheer H Mafatlal (Supra), the Apex Court has already held that when the majority of the shareholders with their open

eyes have given their approval to the scheme, even if in the view of the Court there would be a better scheme for the Company and its members, the Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction. In the aforesaid decision, the Apex Court has also quoted with approval the following observations made by the Madras High Court in Kamla Sugar Mills Ltd., (1984) 55 Company Cases 308 dealing with an identical objection about the exchange ratio adopted in the Scheme of Compromise and Arrangement :-

> "Once the exchange ratio of the shares of the transferee-company to be allotted to the shareholders of the transferor-company has been worked out by a recognized firm of chartered accountants who are experts in the field of valuation and if no mistake can be pointed out in the said valuation, it is not for the Court to substitute its exchange ratio, especially when the same has been accepted without demur by the overwhelming majority of the shareholders or the two companies or to say that the shareholders in their collective wisdom should not have accepted the said exchange ratio on the ground that it will be detrimental to their interest."

11. In the facts of the instant case also, the aforesaid exchange ratio and the other features of the Scheme of Arrangement and Restructure have been accepted by an overwhelming majority of shareholders (90.85% in number and 99.32% in value) out of the shareholders who responded to the postal ballot under the Companies (Passing of Resolutions by Postal Ballot) Rules, 2001. The scheme is also unanimously approved by the secured creditors and all the unsecured creditors who were present at the meeting convened pursuant to the orders of this Court in Company Application No. 213 of 2001.

12. In view of the above, the first as well as the second objections raised by the objector cannot be sustained.

Objection No. (iii) - Non Disclosure of Directors' Interest

13. Coming to the third objection, the objector has submitted that the information presented to the shareholders alongwith postal ballot papers indicated the

shareholding of the Directors in their individual capacity as on 30.6.2001 in the demerged Company and also in the resulting Company, but the brochure did not give details about the shareholding of the Companies in which the Directors are substantially interested and having controlling interest in such other Companies which are holding shares in Alembic Ltd. and Darshak Ltd.

14. In this connection, it is necessary to refer to the provisions of Section 393 of the Act. The relevant provision of Section 393(1) states that where a meeting of creditors or any class of creditors, or of members of any class of members, is called under Section 391 -

> with every notice calling the meeting which is sent to a creditor or member, there shall be sent also a statement setting forth the terms of the compromise or arrangement and explaining its effect, and in particular, stating any material interests of the directors, managing director ... ... or manager of the Company, whether in their capacity as such or as members or creditors of the Company or otherwise, and the effect on those interests, of the compromise or arrangement, if, and in so far as, it is different from the effect on the like interests of other persons.

15. It appears from a perusal of the aforesaid provision that the material interest of the directors/ managing director/manager of the Company would be required to be given whether such material interests in their capacity as directors or as shareholders of the Company or otherwise and in a given case even in their capacity as shareholders in another Company which holds the shares in the applicant Company, but such disclosure is to be made when the effect of the proposed compromise and arrangement on those material interests is different from the effect on the like interests of other persons. It is not the case of the objector that the effect of the proposed scheme on the interests of the directors of Alembic Ltd. in their capacity as shareholders in other closely held Companies having shares in Alembic Ltd. is going to be different from the effect on the like interests of the other shareholders either in Alembic Ltd. or in Darshak Ltd.. In this view of the matter, the sanction to the scheme is not required to be withheld on the ground that the disclosure in the notice convening the meeting fell short of the requirements of Section 393(1)(a) of the Companies Act, 1956.

Objection No. (iv) - Latest Financial Picture

16. Coming to the last objection, the objector has relied on the decision in KEC International Ltd. vs.Kamani Employees' Union, (2000) 36 CLA 124 (Bom.) [as noted at page. 2951 of A. Ramaiya's Guide to the Companies Act, 15th Edition 2001] in support of his submission that the information of the latest financial position of the two Companies is not given to the Court, because the latest financial position of the Company would mean the financial position as at the time of final hearing of the petition. It is submitted that the petitioner has not complied with this mandatory statutory requirement.

17. The proposed scheme is to come into effect from 1.4.2000. The Chartered Accountants in their report dated 17.4.2001 have also stated that they had undertaken the valuation of the Bulk Drug Division of Darshak Ltd. and determined the share exchange ratio between Alembic Ltd. and Darshak Ltd. as at 31.3.2000. The Chartered Accountants have also considered the financial position of the two Companies as at 31.3.2000. Pursuant to the orders passed by this Court on 9.8.2001, the meetings were convened on 29.9.2001 and after approval of the proposed scheme by all the secured creditors and unsecured creditors present and voted at the meeting and by 99% of the shareholders who responded through postal ballot, the scheme came to be presented on 11.10.2001 for sanction of this Court. Hence, it is obvious that on the date of filing this application i.e. 11.10.2001 the Company could have produced only the audited accounts of Alembic Ltd. as at 30.12.2000.

18. The objector, however, submits that since the petition is being heard today, the petitioner Company could have produced the accounts as at 31.12.2001.

On the other hand, the learned counsel for the petitioner-Company have placed reliance on the decisions of the Delhi and Bombay High Courts in Aradhana Beverages and Foods Co. Ltd. Re, (1998) 93 Com. Cases 899 (Delhi) and All India Blue Star Employees Federation vs. Blue Star Ltd. (2000) 1 Comp LJ 351 (Bom). It is stated on behalf of the petitioner-Company that latest auditor's report which was then available was filed with the application; the application was filed in November 2001 and, therefore, the audited accounts of the Company as on 30.12.2000 were required to be produced.

19. The Court does not propose to go into this controversy in the facts of the instant case. Apart from the fact that it is not the case of the objector that there is any significant change in the financial position of the demerged Company (Darshak Ltd.) or the resulting Company (Alembic Ltd.) in the intervening period i.e. in the year 2001, the thrust of the objector's submission is that the shareholders of Darshak Ltd. have been treated unfairly as compared to the shareholders of Alembic Ltd. The objector himself holds only 30 shares of Rs.10/each in Alembic Ltd. No other shareholder in Alembic Ltd. (except the present objector) out of all those who sent their postal ballots has come forward to oppose the proposed Scheme. In view of the detailed justification given in paras 7.2 and 7.3 of the petition and extracted in para 2 hereinabove, the proposed Scheme of Arrangement and Restructure appears to be in the interest of the petitioner-Company and its shareholders.

20. It is also pertinent to note that the Central Government on which a copy of the petition is served alongwith the notice does not oppose the scheme as already indicated earlier in para 5.3 hereinabove.

21. In view of the above discussion, there is no merit in any of the objections raised by the objector.

22. As far as the costs claimed against the objector are concerned, it is true that the Court has not found any merit in any of the objections raised by objector-Mr Dipakkumar J Shah, but nothing is brought on record to show that he is a habitual objector for extraneous considerations. Hence, the Court does not propose to pass any order of costs against the objector.

O R D E R

23. The petition is accordingly allowed and the sanction is granted to the Scheme of Arrangement and Restructure at Annexure "C" to the petition. The prayer in terms of para 21(a) is granted.

24. The petitioner Company shall pay the fees of the learned Additional Standing Counsel for the Central Government which are quantified at Rs.2,500/-.

(M.S. Shah, J.)
sundar/-